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No. 426

In the Supreme Court of the United States

OCTOBER TERM, 1952

WILLIAM HEIKKILA, APPELLANT

v.

BRUCE G. BARBER, INDIVIDUALLY AND AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE FOR THE THIRTEENTH IMMIGRATION DISTRICT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

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ORDER BELOW

The specially convened three-judge District Court did not enter an opinion. The order of that court appears at R. 13–14.

JURISDICTION

The order of the District Court dismissing appellant's complaint (R. 13–14) was entered on August 4, 1952. A petition for appeal was filed in the District Court on September 3, 1952 (R. 14–15). Probable jurisdiction was noted by this

Court on December 8, 1952 (R. 19). The jurisdiction of this Court to review on direct appeal the judgment of the District Court denying the interlocutory injunction prayed for and dismissing appellant's complaint is conferred by 28 U. S. C. 1253.

QUESTIONS PRESENTED

1. Whether Section 10 of the Administrative Procedure Act makes deportation orders subject to judicial review otherwise than in habeas corpus proceedings.

2. If Section 10 of the Administrative Procedure Act applies, whether the Commissioner of Immigration is an indispensable party to an action seeking review of an order for appellant's deportation.

3. Whether Section 22 of the Internal Security Act of 1950, providing for the deportation of aliens who have been members of the Communist Party at any time after entering the United States, is invalid as violating the *ex post facto*, bill of attainder, free speech, or due process provisions of the Constitution.

4. Whether appellant's privilege against self-incrimination was violated by use in his deportation hearing of his previous admission of membership in the Communist Party made in an earlier deportation hearing, which had been abandoned because not held in compliance with the Administrative Procedure Act.

STATUTES INVOLVED

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, provides in part as follows:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.
>
> (c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any prelimi-

nary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

* * * * *

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Section 19 (a) of the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U. S. C. 155 (a), directs that any alien found subject to deportation "shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final."

The Act of October 16, 1918 (40 Stat. 1012), as amended by the Act of June 5, 1920 (41 Stat. 1008), and the Act of June 28, 1940 (54 Stat. 670, 673, 8 U. S. C. (1946 ed.) 137), provides in pertinent part:

> Sec. 1. That any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * *
>
> (c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, * * *
>
> (d) Aliens who write * * * any written or printed matter * * * advising, advocating or teaching: (1) the overthrow by force or violence of the Gov-

ernment of the United States or of
forms of law, * * *

(e) Aliens who are members of or affi
ated with any organization, association, s
ciety, or group, that writes, circulates, di
tributes, prints, publishes, or displays,
causes to be written, circulated, distribute
printed, published, or displayed, * *
written or printed matter of the charact
described in subdivision (d). * * *

Sec. 2. Any alien who was at the tim
of entering the United States, or has bee
at any time thereafter, a member of an
one of the classes of aliens enumerated
section 1 of this Act, shall, upon the wa
rant of the Attorney General, be taken in
custody and deported * * *.

Section 22 of the Internal Security Act of 195
64 Stat. 1006, amended 8 U. S. C. 137, to pr
vide in section 1 (2) for the exclusion of "Alie
who, at any time, shall be or shall have bee
members of the following classes: * * * (C
Aliens who are members of * * * (i) th
Communist Party of the United States" and
provide in section 4 (a) for the deportation
"Any alien who was at the time of entering th
United States, or has been at any time thereafte
* * * a member of any one of the classes
aliens enumerated in section 1 (2)."

STATEMENT

On July 11, 1952, appellant commenced an a
tion in the United States District Court for th

Northern District of California seeking temporary and permanent injunctions against the enforcement of an order for his deportation, a declaration of his rights with respect thereto, and review of the administrative action resulting in such order (R. 1–7). The complaint named as defendants the respondent Barber individually and as District Director of the Immigration and Naturalization Service for the Thirteenth District, together with various unnamed persons designated only as John Does 1 through 10. The complaint asserted that the jurisdiction of the District Court was based upon Section 10 of the Administrative Procedure Act, and upon 28 U. S. C. 1331 and 1346 (a) (2), which in part define the jurisdiction of district courts.

The complaint alleged that appellant had been arrested in December 1947, under a warrant of arrest charging him with violation of the immigration laws in that he was then a member of an organization which advocated the overthrow of the government of the United States by force and violence. Hearings were held in 1949 before a hearing officer of the Immigration and Naturalization Service, but were discontinued after the decision of this Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (R. 2–3) that deportation hearings must be conducted in accordance with the Administrative Procedure Act. New hearings were conducted in June 1950, and continued in November 1950. At the June 1950 hearing, there

was introduced in evidence a portion of the tra
script of the 1949 hearing in which appella
admitted that he had been a member of th
Workers Party and of the Communist Part
from 1929 to 1939 (R. 3). At the hearings in N
vember 1950, a new charge was laid against appe
lant under Section 22 of the Internal Security A
of 1950, charging him with having been, after entr
a member of the Communist Party. The hearin
officer recommended appellant's deportation o
the ground that the charge laid under the Interna
Security Act of 1950 had been established by th
admission contained in the transcript of the 194
hearings introduced in evidence. On appeal, th
hearing officer's decision was affirmed on July 1
1951, by the Assistant Commissioner, Adjudica
tions Division, and on January 11, 1952, by th
Board of Immigration Appeals (R. 5).

Appellant alleged that the 1950 hearings de
prived him of due process of law in that, at th
June hearing, the Hearing Examiner, althoug
appointed in accordance with Section 11 of th
Administrative Procedure Act, was not an im
partial hearing officer as required by that Ac
in that he was a former employee of the Immigra
tion and Naturalization Service with experienc
in investigation, prosecution and hearings wit
regard to aliens. It was further alleged that a
the hearing in November 1950, the hearing office
functioned without compliance with the Adminis
trative Procedure Act on the theory that, by rea

son of the enactment of the Supplemental Appropriations Act (64 Stat. 48, 8 U. S. C., Supp. V, 155a) the Administrative Procedure Act no longer applied (R. 3–4). He also alleged that the admission of the transcript of the 1949 hearing at the 1950 hearings deprived him of due process of law and of his privilege against self-incrimination (R. 3).

In addition, appellant alleged that the Workers Party and the Communist Party, during the period from 1929 to 1939 were not organizations which believed in, advocated or advised the overthrow of the government of the United States by force and violence, and that he personally did not at any time advocate such violent overthrow. He alleged that the hearing officer's rejection of his offer to prove such allegations deprived him of due process of law. He further alleged that Section 22 of the Internal Security Act was unconstitutional as a bill of attainder and an *ex post facto* law in violation of Article I, Section 9, Clause 3, of the Constitution, and a deprivation of the guarantees of free speech and due process of law under the First and Fifth Amendments (R. 5–6).

Respondent moved to dismiss the complaint on the grounds (1) that an indispensable party, i. e., the Commissioner of Immigration and Naturalization, who had ordered that appellant be deported, had not been joined as a party and (2) that the complaint failed to state a claim

upon which relief could be granted since p
tioner had been accorded a fair hearing, Sec
22 of the Internal Security Act of 1950 was c
stitutional, and appellant had an adequate rem
at law (R. 8–9).

On August 4, 1952, a three-judge court, wh
had been convened pursuant to 28 U. S. 2
(R. 7–8), granted the motion to dismiss the c
plaint (R. 13–14).

SUMMARY OF ARGUMENT[1]

I

For the reasons set forth in the respondc
brief in *Martinez* v. *Neelly*, No. 218, this Te

[1] The appellant does not urge in his brief (except in
specification of errors) his contention that he was depr
of due process of law and of the protection of the Adm
trative Procedure Act, in that the deportation hearin
June 1950 was presided over by a hearing examiner,
pointed pursuant to Section 11 of that Act, who, prior to
appointment, had conducted investigations, prosecutions
hearings for the Immigration and Naturalization Ser
In any event, the contention is without merit unless it ca
said that no prosecutor should ever be made a judge. M
over, by the time of the deportation hearing in Noven
1950, when there was lodged the charge upon which appel
was ordered deported, Congress had provided in the Sup
mental Appropriation Act, 1951 (64 Stat. 1044, 1048) e
tive September 27, 1950, that Sections 5, 7 and 8 (and
necessary implication Section 11) of the Administrative
cedure Act, should not apply to deportation proceedi
Also, appellant does not even suggest how he could have
prejudiced by the background of the hearing officer, since
deportation order is based solely upon appellant's admis
of membership in the Communist Party.

pp. 18–46, we contend that the order for appellant's deportation was reviewable only in habeas corpus proceedings.

II

For the reasons set forth in the same brief, at pp. 46–52, we contend that the Commissioner of Immigration (or the Attorney General) is an indispensable party to this action seeking judicial review of a deportation order, and cannot be sued in the Northern District of California.

III

Section 22 of the Internal Security Act of 1950, in providing for the deportation of aliens who have been members of the Communist Party of the United States at any time since entry into the United States, is a valid determination by Congress that past and present alien members of the Communist Party are undesirable residents of the United States. Congress based this determination upon overwhelming evidence received by its committees between 1931 and 1950, that the Communist Party of the United States has as its purposes the violent overthrow of the Government of the United States and serving as a fifth column for the Soviet Union. These conclusions are buttressed by repeated judicial decisions as to the nature and purposes of the Communist Party from 1920 to the present time, and by the record of persistent espionage, sabotage, and propaganda by Communists here and elsewhere on behalf of

Most of the grounds upon which appellant challenges the validity of Section 22 have been resolved adversely to him by this Court's recent decision in *Harisiades* v. *Shaughnessy*, 342 U. S. 580. That case involved the validity of Section 23 (a) of the Alien Registration Act of 1940, 8 U. S. C. (1946 ed.) 137, which made subject to deportation aliens who, at any time after entry, had been members of an organization advocating the overthrow of the government of the United States by force and violence, as applied to aliens found to have been members of the Communist Party before 1940, even though there was no finding that the aliens themselves advocated or knew that the Communist Party advocated such violent overthrow. The statute was upheld against contentions that it was unconstitutional as an *ex post facto* law and an infringement of the First and Fifth Amendments.

The holding in *Harisiades* that deportation is not a punishment for the purposes of the *ex post facto* clause of Article I, Section 9, of the Constitution, disposes of appellant's contention that Section 22 is a bill of attainder (as well as an *ex post facto* law), since a bill of attainder is a legislative act which inflicts *punishment* without trial. *United States* v. *Lovett*, 328 U. S. 303, 315.

The only difference between the presently pertinent portion of Section 22 of the 1950 Act and the statute involved in the *Harisiades* case is the

(C. A. 1) (1930–1935); *United States ex rel. Harisiades* v. *Shaughnessy,* 187 F. 2d 137 (C. A. 2) (1925–1939); *United States* v. *Dennis,* 183 F. 2d 201 (C. A. 2) (1945–1948).

Section 22 is valid. In the course of affirming the *Dennis* conviction (341 U. S. 494), in upholding the related deportation provisions in the same Alien Registration Act of 1940, (*Harisiades* v. *Shaughnessy, supra*), and in upholding the anti-Communist affidavit requirement of the Taft-Hartley Act (*American Communications Ass'n* v. *Douds,* 339 U. S. 382), this Court has recognized that the facts revealed by judicial trials and Congressional investigations beginning in 1931 (H. Rep. 2290, 71st Cong., 3d Sess.) down to date, when read in the light of recent political and military developments, and underscored by persistent espionage and other fifth column activity by Communists in this country and elsewhere on behalf of the Soviet Union, amply justify the conclusion of Congress that past and present alien members of the Communist Party of the United States are undesirable residents. Against that background, this Court in *Carlson* v. *Landon,* 342 U. S. 524, 535–536, noted with respect to Section 22 of the Internal Security Act that:

> * * * Theretofore there was a provision for the deportation of alien anarchists and other aliens, who are or were members of organizations devoted to the overthrow by force and violence of the

> Government of the United States, but the Internal Security Act made Communist membership alone of aliens a sufficient ground for deportation. * * * We have no doubt that the doctrines and practices of Communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien Communists under its power to regulate the exclusion, admission and expulsion of aliens. * * *

Thereafter, in the *Harisiades* case, this Court upheld the provision of the Alien Registration Act of 1940 directing the deportation of any alien who had at any time since entry been a member of an organization advocating the violent overthrow of the Government of the United States. In doing so, this Court held that the expulsion of alien Communists was based upon the following propositions (342 U. S. at 589, 590):

> * * * any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. * * *.
>
> * * * Certainly no responsible American would say that there were then or are now no possible grounds on which Congress

fact that the 1950 Act specifies membership in the Communist Party as a basis for deportation, thus obviating the necessity of proving in individual cases that the Communist Party was at the time of the alien's membership an organization advocating the violent overthrow of the Government. But Congress has found that the Communist Party of the United States is maintained under the control of the Soviet Union largely through alien Communists. Drawing on the analogy of the Alien Enemy Act of 1798 (50 U. S. C. 21), it has specifically designated past and present members of the Communist Party as undesirable residents of the United States. In view of the purposes of the Party as found by Congress, Section 22 is a reasonable exercise of the power of Congress to provide for the deportation of any class of aliens whose presence in this country may endanger the security of the United States.

IV

The appellant's assertion that his privilege against self-incrimination was violated when there was received in the deportation hearing in 1950 his testimony in a 1949 hearing that he had been a member of the Communist Party from 1929 to 1939, is without merit. Appellant waived the privilege by his failure to assert it either in the 1949 hearing when he gave the testimony, or when it was received in the 1950 hearing.

ARGUMENT

I

DEPORTATION ORDERS MAY BE REVIEWED BY THE COURTS ONLY IN HABEAS CORPUS PROCEEDINGS

The complaint in this case, seeking an injunction against enforcement of the order of deportation, a declaration of the rights of the parties under the order, and a "review of agency action" (R. 7), obviously has been framed on the theory that Section 10 of the Administrative Procedure Act has made deportation orders reviewable by the courts in proceedings other than habeas corpus. We submit that the judgment below should be affirmed upon the ground that review of deportation orders otherwise than in habeas corpus proceedings is not made available by Section 10, and that the district court was therefore without jurisdiction of the suit. The reasons underlying our contention are set forth fully in the respondent's brief in *Martinez* v. *Neelly*, No. 218, this Term (affirmed by an equally divided Court January 12, 1953), pp. 18–46, to which we respectfully refer the Court.

II

THE ATTORNEY GENERAL OR THE COMMISSIONER OF IMMIGRATION IS AN INDISPENSABLE PARTY TO THIS ACTION

In the court below, the Government's motion to dismiss the complaint was based in part upon the ground that the Commissioner of Immigration

was an indispensable party to an action to review the order for appellant's deportation, and that he was not and cannot be sued in the Northern District of California (R. 8). For the reasons set forth at pp. 46–56 of the respondent's brief in *Martinez* v. *Neelly, supra,* we submit that the judgment below should be affirmed upon the ground that the district court was without jurisdiction because of such failure to join the Commissioner (or the Attorney General) as a party.

In this case, as in *Martinez* v. *Neelly, supra,* the decision of the hearing examiner or inspector was affirmed upon appeal by the Assistant Commissioner, Adjudications Division, and by the Board of Immigration Appeals. In the *Martinez* case, the warrant of deportation directing that the alien be arrested and deported was signed by the Assistant Commissioner, Enforcement Division (*Martinez* v. *Neelly, supra,* resp. br. p. 48). In the instant case, the warrant of deportation was signed on November 29, 1951, by the appellee Barber as District Director, San Francisco District of the Immigration and Naturalization Service, pursuant to 8 C. F. R. (1951 Supp.) 152.2 (a) which provided that "The officer in charge of the appropriate district, the Assistant Commissioner, Enforcement Division, or the Commissioner, shall have the authority to issue a warrant of deportation in any case in which an order of deportation has become final." However, under the rationale of the Third Circuit's decision

in *Paolo* v. *Garfinkel*, Dec. 8, 1952 (reproduced as Appendix B of respondent's brief in *Martinez* v. *Neelly, supra*), this distinction would not seem to be significant, unless a decree against the appellee Barber is deemed to preclude his superiors the Commissioner and Assistant Commissioner from issuing a warrant for the deportation of appellant.

III

CONGRESS HAS THE POWER TO PROVIDE FOR THE DEPORTATION OF ALIENS WHO AT ANY TIME AFTER ENTRY INTO THE UNITED STATES HAVE BEEN MEMBERS OF THE COMMUNIST PARTY OF THE UNITED STATES

If the issue of the constitutionality of Section 22 of the Internal Security Act is reached, most of appellant's objections to the statute already have been resolved against him by this Court's decision in *Harisiades* v. *Shaughnessy*, 342 U. S. 580. In that case, this Court upheld the constitutionality of Section 23 (a) of the Alien Registration Act of 1940, 8 U. S. C. (1946 ed.) 137 which made subject to deportation aliens who at any time after entry, had been members of an organization advocating the overthrow of the government of the United States by force and violence, as applied to aliens found to have been members of the Communist Party before 1940 even though there was no finding that the particu

lar aliens advocated or knew that the Communist Party advocated such violent overthrow. The statute was upheld against contentions that it was unconstitutional as an *ex post facto* law and an infringement of the First and Fifth Amendments.

The only difference between the pertinent portion of Section 22 of the 1950 Act and the statute involved in the *Harisiades* case is the fact that Section 22 specifies past or present membership in the Communist Party of the United States as a basis for deportation, thus obviating the necessity of proving in each individual case that the Communist Party was at the time of the alien's membership an organization advocating the violent overthrow of the government of the United States.

This Court held in *Harisiades* that even if the 1940 Act "were found to be retroactive," it would not constitute an *ex post facto* law in violation of Article I, Section 9, of the Constitution, reiterating that deportation is not a punishment to which alone the *ex post facto* prohibition is applicable. The related prohibition of Article I, Section 9, against bills of attainder also applies only to legislative acts which inflict *punishment* without a judicial trial. *United States* v. *Lovett,* 328 U. S. 303, 315. Thus, the *Harisiades* decision disposes of appellant's contention that Section 22, in providing specifically for the deportation of aliens who are former members of the Com-

munist Party, is invalid both as an *ex post facto* law and as a bill of attainder.

Similarly, *Harisiades* resolved adversely appellant's contention that Section 22 violates the due process clause of the Fifth Amendment because it provides for the deportation of an alien for past or present membership in a proscribed organization without regard as to whether the alien shared or knew the purposes of the organization.[2]

The *Harisiades* decision left unresolved only the appellant's further contention that Section 22 violates the due process clause because it denies an alien an opportunity to show that the nature and purposes of the Communist Party during the period of his membership were not such as to justify his deportation because of such membership. Section 22 has and was intended by Congress to have that effect. We contend that it is a reasonable exercise of the power of

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[2] Thus, in the Government's brief in the *Harisiades* case, p. 91, it is stated that,

> "some former members of the organization may have been unaware of or not in personal agreement with the policy of forcible overthrow. On these records, it must be assumed that there is no proof that these appellants had such personal beliefs or knowledge. In view of its interpretation of the statute as not requiring proof of more than past membership and the nature of the organization, the Immigration Service has not deemed it necessary to introduce evidence on these subjective matters in its deportation proceedings."

Congress to control aliens in the interest of the security of the United States.

The history of Section 22. Section 22 of the Internal Security Act, like the 1940 statute which was upheld in the *Harisiades* case, reflects long and continuous consideration by Congress of the nature and purposes of the Communist Party of the United States.

In 1931, during the period of appellant's membership in the Party, a special committee of the House investigated and reported on Communist Propaganda in the United States (H. Rep. 2290, 71st Cong., 3d Sess.). That committee cited the language of the program of the Communist Party as established by the Comintern at the Sixth World Congress, September 1, 1929, at Moscow to the effect that:

> The communists consider it unworthy to dissimulate their opinions or their plans. They proclaim openly that their designs can only be realized by the violent overthrow of the entire traditional social order. [H. Rep. 2290, *supra,* p. 15.]

The report concluded that:

> It is self-evident that the communists and their sympathizers have only one real object in view, not to obtain control of the Government of the United States through peaceful and legal political methods as a political party, but to establish by force and violence in the United States and in all other nations a "soviet socialist repub-

lic" to which they often refer in their literature as a "dictatorship of the proletariat." These facts have been repeatedly substantiated at the hearings of the committee. [H. Rep. 2290, *supra*, pp. 65–66.]

In 1935, the McCormack committee of the House, which was charged with the investigation of Nazi and other propaganda, found "both from documentary evidence submitted to the committee and from the frank admission of Communist leaders * * *" that the objectives of the Party included the overthrow by force and violence of the Government of the United States. H. Rep. 153, 74th Cong., 1st Sess. (1935) p. 12. It concluded that the Party "is a party recognized on an international scale, governed and controlled by a constitution and rules emanating from the Communist International with headquarters at Moscow in the Soviet Union, and dedicated to the overthrow of the government by violence and force." H. Rep. 153, *supra*, p. 21.

In 1939, extensive hearings before the House Committee on Un-American Activities informed Congress that in 1929 the Soviet Union, acting through the Communist International ejected Lovestone and Gitlow from the leadership of the Communist Party of the United States and replaced them with Foster and Browder.[3] Current

[3] Hearings before House Committee on Un-American Activities on H. Res. 282, 76th Cong., 1st Sess. (1939) vol. 7, pp. 4432, 4671.

evidence of foreign control of the Party was furnished to Congress when, with the signing of the Hitler-Stalin Pact in August 1939, resistance to Nazi aggression suddenly became an "imperialist war" in the view of American Communists. Also, between 1938 and April 1940, Congress had observed how the ideological allies of Hitler in Austria, Czechoslovakia and Norway had aided in subjecting those countries to Nazi rule.

Thus, by 1940, Congress was not merely concerned with the old-fashioned concept of domestic insurrection, but with the more subtle and dangerous situation in which a local totalitarian political group, whether Communist or Nazi, is the actual or potential fifth column ally of the totalitarian government by which it is controlled. Section 23 (a) of the Alien Registration Act of 1940, in making deportable aliens who had at any time been members of a group advocating the violent overthrow of the government, was part of a larger statute, part of which, known as the Smith Act was upheld by this Court in *Dennis* v. *United States*, 341 U. S. 494, and part of which required the registration of aliens. Indeed, the same Congress also enacted the Voorhis Act of October 17, 1940,[4] requiring the registration of "Every organization subject to foreign control which engages in political activity," and understood that the

[4] 54 Stat. 1201, 18 U. S. C. 2386.

Communist Party of the United States would be required to register.[5]

Between 1940 and 1950, Congress observed that Communist parties everywhere are simply the fifth column of Soviet aggression. Where they have obtained power, as in Czechoslovakia, they have done so by violence, destroyed their political opponents, and degraded their native lands into satellites of the Soviet Union. Where they have not obtained power, they carry on, in the United States and elsewhere, espionage, sabotage, and propaganda on behalf of the Soviet Union. At the present time, American troops are fighting with the United Nations in Korea to check Communist aggression, while this country has entered into costly and unparalleled military alliances to discourage Communist aggression elsewhere.

Section 22 of the Internal Security Act originated in S. 1832, 81st Cong., 2d Sess., which was passed by the Senate on August 9, 1950, and was later incorporated by the Senate into the internal security bill (S. 4037, 81st Cong., 2d Sess.). S. 1832 was introduced by Senator McCarran in May 1949, and was the subject of extensive hearings between May and September 1949, before the Subcommittee on Immigration and Natural-

[5] H. Rep. 2582, 76th Cong., 3d Sess. Immediately, the Communist Party of the United States ostensibly withdrew from the Communist International to avoid registration under the Voorhis Act. See resolution adopted at the 1940 Convention of the Communist Party, reproduced in the record in *Dennis* v. *United States*, 341 U. S. 494, vol. XIV, pp. 11180–11181.

ization of the Senate Committee on the Judiciary, under the heading of *Communist Activities Among Aliens and National Groups.*

After these hearings,[6] S. 1832 was revised to provide, *inter alia,* for the deportation of aliens who have at any time been members of the Communist Party of the United States. It was passed by the Senate without debate (96 Cong. Rec. 12058, 12060). However, the accompanying report of the Senate Committee on the Judiciary (S. Rep. 2230, 81st Cong., 2d Sess.), after summarizing and quoting from the testimony of former high officials of the Communist Party during the 1949 hearings, set forth the conclusions upon which the provision is based, as follows (pp. 10, 11, 12, 16):

> Since the rise of Soviet Russia during the past three decades, the problem of subversives has become a vital consideration in any evaluation of national immigration and naturalization policies. The impact of world events upon our immigration system can no longer be ignored. As an international conspiracy, communism has organized systematic infiltration of our borders for the purpose of overthrowing the democratic Government of the United States by force, violence, and subversion.
>
> * * * * *

[6] As originally introduced, S. 1832 would have provided stricter controls over visas and other travel documents, and strengthened the laws governing the exclusion and deportation of subversive aliens, without specifically referring to the Communist Party of the United States.

The Communist International has in its employ a network of agents whose sole function is to organize and promote Communist activity, sabotage, espionage, propaganda, and terrorism. These agents are sent into the United States and other countries under the policy of the Communist high command. Although some of the agents are native-born Americans or have acquired citizenship through naturalization, a large majority of them are aliens.

* * * * *

The Comintern realizes that it cannot rely on native Americans because to do so involves the constant risk of having its work impeded or exposed. It is to be expected that the loyalty of a native American or of a citizen of long standing would occasionally reassert itself, despite the most intensive Communist indoctrination.

The break with the Communist Party by men like Louis Budenz, Howard Rushmore, Jay Lovestone, Benjamin Gitlow, and others offers conclusive proof to Moscow that it can only rely on its own chosen agents for the work of destroying America. In the event of a clash of arms between the Soviet homeland and this country, the Communists would find it even more difficult to rely upon native Americans and those of foreign origin who become Americanized. * * *

* * * * *

It is a well-established fact that both the leadership and membership of the Com-

munist Party is recruited overwhelmingly from alien ranks. During the course of its 30 years of existence in this country the Communist Party has been ruled exclusively by alien agents appointed by the Communist International headquarters in Moscow.

The high command of the party in this country invariably has been dominated by aliens or persons of foreign origin. These facts have been documented by the testimony presented before the subcommittee.

* * * * *

From the statements made before the subcommittee, as well as the general evidence gathered—the history of the Communist movement, the changes of its policies, the manner of its expression, the utterances of the Comintern leadership—the conclusion is inescapable that the Communist Party and the Communist movement in the United States is an alien movement, sustained, augmented, and controlled by European Communists and the Soviet Union. The severance of this connection and the destruction of the life line of communism becomes, therefore, substantially an immigration problem.

After reviewing existing law, the Committee noted (p. 24–25) that:

* * * While Congress has clearly proscribed classes of aliens which are to be excluded from admission or deported after admission, there is the obvious difficulty of establishing that certain aliens or organ-

> izations do advocate overthrowing the Government by force or violence. It is inherent in the tactics of such persons and organizations that their real intentions be concealed under an aura of legitimacy in order to accomplish their purpose. Thus, though it may be common knowledge that certain organizations advocate such beliefs, satisfactory proof of that position offers a formidable obstacle. The evidence developed by the subcommittee should remove any doubt about the Communist Party's advocating the overthrow of our Government by force or violence in order to consummate its plans of a world-wide Communist totalitarian dictatorship. Yet, membership in the Communist Party, without positive proof that it so advocates the overthrow of government by force and violence, is insufficient grounds for deporting such an alien member.

The substance of the Committee's conclusions is embodied in the extraordinary findings which Congress made in Section 2 of the Internal Security Act as to the purposes and methods of communism, "As a result of evidence adduced before various committees of the Senate and House of Representatives."

The bitter debate over the internal security bill did not relate to Section 22. Indeed, the dissenting minority of the Senate Committee on the Judiciary stated that "We do not quarrel with the provision * * * for the exclusion

of alien members of the Communist Party of the United States, or with the later provision [Section 22 of the Internal Security Act] for their deportation. It is undisputed that the Communists of the world, including the United States, are the fifth column allies of the Soviet Union." Rep. 2369, Part 2, 81st Cong., 2d Sess., p. 14.

Section 22 is thus a substantially unanimous Congressional determination that the Community Party of the United States has at all times been a foreign-controlled organization devoted to the ultimate overthrow of the government by violence and, more immediately, acting as a fifth column in aid of Soviet aggression.[7]

This conclusion of Congress is supported not only by its own investigations but by repeated judicial and administrative determinations that the Communist Party at various times advocated the violent overthrow of the government of the United States. *Skeffington* v. *Katzeff*, 277 Fed. 129 (C. A. 1) (covering the period 1919–1920); *Ex parte Vilarino*, 50 F. 2d 582 (C. A. 9) (1926–1929); *Murdoch* v. *Clark*, 53 F. 2d 155 (C. A. 1) (the 1920's); *United States ex rel. Yokinen* v. *Commissioner of Immigration*, 57 F. 2d 707 (C. A. 2) (the late 1920's); *Kjar* v. *Doak*, 61 F. 2d 566 (C. A. 7) (the late 1920's); *In re Saderquist*, 11 F. Supp. 525 (D. Me.), affirmed, 83 F. 2d 890

[7] Section 22 has been embodied in the Immigration and Nationality Act of 1952 (Pub. Law 414, 82d Cong.) as Section 241 (a) (6) of that Act.

might believe that Communists in our midst are inimical to our security.

Congress received evidence that the Communist movement here has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists.

By providing, in Section 23 (a) of the Alien Registration Act, for the deportation of past and present members of any organization advocating the violent overthrow of the government, Congress eliminated the administrative burden of distinguishing between aliens who had sincerely abandoned Communist principles and those who had not. This Court held in *Harisiades v. Shaughnessy, supra,* at pp. 595–596:

> When the Communist Party as a matter of party strategy formally expelled alien members en masse, it destroyed any significance that discontinued membership might otherwise have as indication of change of heart by the individual. Congress may have believed that the party tactics threw upon the Government an almost impossible burden if it attempted to separate those who sincerely renounced Communist principles of force and violence from those who left the party the better to serve it. Congress, exercising the wide discretion that it alone has in these matters, declined to accept that as the Government's burden.

By providing specifically in Section 22 of the Internal Security Act for the deportation of aliens "who, at any time, shall be or shall have been members of * * * the Communist Party of the United States," Congress has, in practical effect, done no more than eliminate the burden of introducing again and again in such deportation proceedings evidence as to the nature and activities of the Communist Party.[8]

In deportation proceedings under the 1940 Act, the government's evidence as to the Party's advocacy of political violence routinely consists of certain documentary evidence plus the testimony of one or more persons who were key members of the Party during the period of the alien's membership. Erratic and discriminatory enforcement would be the result if in different cases, involving substantially the same evidence, administrators and courts arrived at different conclusions as to whether the Communist Party advocated the violent overthrow of the government. Thus, by Section 22 Congress has simply

[8] See *Milasinovich* v. *The Serbian Progressive Club*, 369 Pa. 26, and *In re Albert*, Pa. Sup. Ct., Nov. 25, 1952, 21 U. S. Law Week 2256, in which the Supreme Court of Pennsylvania held that judicial notice may be taken of the fact that the Communist Party advocates the overthrow of the government by force. In the latter case, the court stated that:

"It would seem almost an absurdity of legal procedure to continue to submit to various juries in individual cases a question so readily and authoritatively determinable from the mere perusal of the writings of the acknowledged founders and protagonists of the Communist movement * * *."

substituted for a process of proof in individua cases a uniform rule based upon both its own inves tigations and the result of judicial and administra tive proceedings.

More broadly, Congress was proceeding by con scious analogy [9] to the Alien Enemy Act of 179 which authorizes the deportation of aliens who are nationals of a country at war with the United States or by which invasion of American terri tory is "threatened". As this Court noted in *Har isiades* v. *Shaughnessy, supra,* at p. 587:

> War, of course, is the most usual occasion for extensive resort to the power. Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, and his property becomes subject to seizure and perhaps confiscation. But it does not require war to bring the power of deporta tion into existence or to authorize its exer cise. Congressional apprehension of for eign or internal dangers short of war may lead to its use.

By the Alien Enemy Act, Congress conferred upon the President power to deport aliens who are nationals of a hostile country without regard to whether a particular alien has ever evidenced

[9] See S. Rep. 2230, 81st Cong., 2d Sess., pp. 16–17; *The Immigration and Naturalization Systems of the United States*, S. Rep. 1515, 81st Cong., 2d Sess., pp. 788–789.

the slightest hostility to the interests of the United States.[10] Presidential action under the Act is reviewable only upon the issue of whether the particular alien falls into the category of enemy aliens. *Ludecke* v. *Watkins*, 335 U. S. 160. By the 1940 statute upheld in *Harisiades*, Congress provided for the deportation of past and present alien members of an organization advocating the violent overthrow of the Government, again without regard to a particular alien's knowledge of or share in such objective. Thus, the power of Congress to provide for the deportation of classes of aliens to protect the security of the United States is settled.

It is clear that this power of Congress can be exercised in a manner relevant and appropriate to the apprehended danger. The Alien Enemy Act dealt with problems of internal security created by actual or threatened hostilities between national states and with the techniques of warfare which existed in the early 19th century. In 1950, Congress was dealing with the threat to its peace and security then and now confronting the United States. It has found that Communists everywhere have as their objectives the violent over-

[10] That the Fifth Congress which enacted the Alien Enemy Act did not regard the use of its powers over aliens to protect the security of the nation as limited to periods of actual war, is emphasized by the fact that the House twice rejected proposals to delete the words "or threatened". Annals of Congress, 5th Cong., 2d Sess., pp. 1786, 1792.

throw of non-Communist governments and serving the interests of the Soviet Union. It has found that "the Communist movement here has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists." It has concluded, in effect, that the possibilities of political violence and treachery, particularly in a time of crisis, on the part of alien members of the Communist Party are too great for the United States to assume the risks of attempting to distinguish between those members of the Party who have knowledge of and share its purposes, and those who do not, or of determining the sincerity of those who assert they have left the Party and rejected its principles.

If a statute passed during time of war specifically named the enemy countries whose citizens were to be detained or deported, it would be just as valid as if it referred to "enemies" generally, with precisely the same intention and meaning. The Constitution certainly does not bar treating in the same way alien members of an organization which the past thirty years have demonstrated to be merely the *alter ego* of an aggressive Communist state.

Unlike the Alien Enemy Act, the applicability of Section 22 is determined, not by the accidents of birth and ancestry, but by an alien's voluntary membership in the Communist Party. As this

Court said in *American Communications Association* v. *Douds*, 339 U. S. 382, 391:

> The fact that the statute identifies persons by their political affiliations and beliefs, which are circumstances ordinarily irrelevant to permissible subjects of government action, does not lead to the conclusion that such circumstances are never relevant. * * * If accidents of birth and ancestry under some circumstances justify an inference concerning future conduct, it can hardly be doubted that voluntary affiliations and beliefs justify a similar inference when drawn by the legislature on the basis of its investigations.

Moreover, the appellant's contention (App. Br. pp. 40–41) that applying Section 22 to him because of his admitted membership in the Communist Party from 1929 to 1939 involves unfair surprise, is fully answered by this Court's observation in *Harisiades* v. *Shaughnessy*, *supra*, at p. 593:

> During all the years since 1920 Congress has maintained a standing admonition to aliens, on pain of deportation, not to become members of any organization that advocates overthrow of the United States Government by force and violence, a category repeatedly held to include the Communist Party. These aliens violated that prohibition and incurred liability to deportation. They were not caught unawares by a change of law. There can be no con-

tention that they were not adequately fore warned both that their conduct was pro hibited and of its consequences.

We submit that upon the basis of the over whelming testimony received by Congress, con firmed by events of common knowledge, as to th purposes of the Communist Party and as to th major role played by aliens in organizing th Party and keeping it under the control of th Soviet Union, Section 22 is a reasonable exercis of Congress' plenary powers over aliens to pro tect the security of the United States.

IV

There Was No Violation of Appellant's Privilege Against Self-Incrimination

Appellant also contends that the order of de portation against him is invalid because base upon evidence received in violation of his privi ege against self-incrimination. Specifically, h points out that in the June 1950 hearing, ther was introduced a portion of the transcript o record of the earlier hearing, in 1949, in whic he had testified that he had been a member o the Communist Party from 1929 to 1939 (R. 3) He alleges that this receipt of his earlier testi mony violates his privilege against self-incrimina tion under the Fifth Amendment.

Appellant bases his claim of privilege upon th ground that evidence as to his past membershi

in the Party would tend to incriminate him under the Smith Act, as this Court has held. *Brunner* v. *United States*, 343 U. S. 918; *Blau* v. *United States*, 340 U. S. 159.

But the appellant does not allege that during the June 1950 deportation hearing he objected to the admission of his earlier testimony that he had been a member of the Communist Party. Clearly, his privilege against self-incrimination was waived if he failed to assert it. *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113; *Rogers* v. *United States*, 340 U. S. 367, 370-371. Absent even an allegation that he made a timely assertion of his privilege when his prior testimony was introduced during the June 1950 hearing, appellant cannot now be heard to contend that its admission was improper.[11]

Moreover, even if appellant had asserted the privilege during the June 1950 hearing when his earlier testimony was introduced, that testimony would have been admissible since it was given in the 1949 deportation hearing without any claim

[11] In fact, the administrative deportation record, which is not a part of the record before this Court, shows that neither during the hearing nor in his exceptions to the hearing examiner's decision did appellant assert his privilege against self-incrimination. Appellant also contends that it was not incumbent upon him to assert his claim of privilege in the 1950 hearing because his earlier testimony, given without a claim of privilege, was already usable against him in a Smith Act prosecution. We agree, and for the same reason it was usable against him in a subsequent deportation hearing.

of privilege by appellant.[12] It has been held repeatedly in a variety of situations that evidence given without claim of privilege or admissions made in the course of an earlier legal proceeding, are admissible thereafter notwithstanding a claim of privilege. *Perlman* v. *United States*, 247 U. S. 7; *Powers* v. *United States*, 223 U. S. 303; *Schoeps* v. *Carmichael*, 177 F. 2d 391, 396–398 (C. A. 9); *Milton* v. *United States*, 110 F. 2d 556, 559–560 (C. A. D. C.); *Heller* v. *United States*, 57 F. 2d 627, 629 (C. A. 7); *Orth* v. *United States*, 252 Fed. 569 (C. A. 4); *United States* v. *Mary Helen Coal Corp.*, 24 F. Supp. 50 (E. D. Ky.); *United States* v. *Lindsly*, 7 F. 2d 247, 255 (E. D. La.), reversed on other grounds, 12 F. 2d 771 (C. A. 5). And see Annotation, *Use in Subsequent Prosecution of Self-Incriminating Testimony Given Without Invoking Privilege*, 5 A. L. R. 2d 1404.[13]

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[12] Appellant was represented by counsel of his choice when he testified in the 1949 hearing as to his membership in the Communist Party.

[13] Appellant seeks to be excused from his failure to assert his privilege during the June 1949 hearing on the ground that not until August 1949, was it known that the government considered "that membership in the Communist Party was evidence of subversive activity in violation of the Smith Act" (App. Br. pp. 59–60). This is incorrect. The *Dennis* indictment was returned in July 1948, and the Court of Appeals for the Ninth Circuit has held that proof of the *Dennis* prosecution "together with the public anti-Communist agitation and that in Congress" justified witnesses before a grand jury in October 1948 in refusing to answer questions relating to the Communist Party. *Alexander* v. *United States*, 181 F. 2d 480, 482–485.

Under these decisions, the use of his earlier sworn testimony at the second hearing was no different than the use of a deposition against him. The fact that the testimony was made at a hearing which would not support a deportation order because of this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, does not prevent appellant's statements from being used as admissions. Wigmore, *Evidence* (3d ed. 1940), Section 1048, 2276.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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